

(1926) 08 BOM CK 0005
In the Bombay High Court
Case No : First Appeal No. 264 of 1925

Maneklal Mansukhbai

APPELLANT

Vs

The Saraspur Manufacturing Company Ltd.

RESPONDENT

Date of Decision : 10-08-1926

Acts Referred:

Companies Act, 1913 — Section 171

Citation : AIR 1927 Bom 167 : (1927) 29 BOMLR 253 : 101 Ind. Cas. 144

Hon'ble Judges : Kemp, J; Amberson Marten, J

Bench : Division Bench

Judgement

Amberson Marten, Kt., C.J.—The question we have to decide is whether leave ought to be given to the appellant to continue against the respondent-company a suit No. 672 of 1924 filed by him in the Court of the First Class Subordinate Judge at Ahmedabad against the respondent-company and two other defendants who were in fact the agents of the respondent-company. That leave is required because the company is in liquidation and the suit in question was brought after the winding-up petition although before the winding-up order. Accordingly, Section 171 of the Indian Companies Act, 1913, provides:-

When a winding-up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court, and subject to such terms as the Court may impose.

2. Of course as we all know, the winding-up order relates back to the date of the presentation of the winding-up petition.

3. The plaint itself asked for a declaration (a) that a sum of Rs. 7,63,429 was due by all the defendants to the plaintiff and for payment of that sum jointly and severally; (b) that the defendant-company might be ordered to execute a first legal mortgage of all their moveable and Immovable properties to secure repayment to the plaintiff of the said amount; (c) that the other defendants might be ordered to execute a proper document by way of assignment in favour

of the plaintiff for the repayment of the same moneys of certain commission and other moneys payable by the defendant-company to the agency firm; (d) and (e) for a Receiver and an injunction; (f) for accounts and inquiries and orders for sale of the said properties as to the Court may appear just; and (g) for further and other relief.

4. The plaint was based substantially on the allegation that on June 28, 1923, the directors passed certain resolutions, by one of which it was resolved that a sum of rupees ten lacs was required by the company, and that it be borrowed from the present plaintiff on the security of the assets of the company at six per cent. per annum and repayable in three years, and that a "proper legal first charge on the assets of the company be created" as the plaintiff may require, and that the agents be authorized to pass an agreement to that effect and get the same duly sealed and signed by the directors. It was further resolved that out of that loan of ten lacs, rupees seven lacs had already been advanced by the plaintiff "to the company on the joint and several responsibility of the company and the agents, and that the company do pass a proper demand promissory note in respect of the same."

5. On the same day there came a letter from the agents of the company setting out what the arrangement in this respect was, and stating that upon the said charge being made in favour of the plaintiff he was to advance the remaining sum of rupees six and a half lacs to the two companies. I should explain that though we are giving judgment in the case of one company, viz., the Saraspur Manufacturing Company Ltd., there is a companion appeal in which similar points arise, and that this letter in fact refers to the two companies, viz., the present defendant-company, and also to the New Edward Manufacturing Company.

6. It would also appear, according to the plaintiff's case, that some six or seven lacs had in fact been advanced to the company by June 28, 1923. The plaintiff also contends that there was a further sum of Rs. 80,000 advanced to the company at a later date. But the particulars of this last payment are not before us. It would appear from what counsel has stated that Rs. 25,000 part thereof was advanced on June 26. The remaining two payments of Rs. 40,000 and Rs. 15,000 are stated by the plaintiff's counsel to be on June 30 and July 9 respectively. Further, according to the particulars handed up to us, the precise amount up to June 16, 1923, was six lacs.

7. The next important point to mention is that on July 6, the title deeds of the Immovable properties were sent by the defendant-company to the plaintiff. Then in October or November, according to the plaintiff's case, the company intimated that it proposed to obtain a larger advance, viz., fifteen lacs, from elsewhere, and to pay off the existing loan to the plaintiff, and that the company consequently would not require the full loan of ten lacs from the plaintiff.

8. The plaintiff, accordingly, alleges in para. 11 of his plaint that there was here a release by the defendant-company from the obligation to furnish the balance

making up the full ten lacs, and therefore it was agreed that the loan should be repayable on demand and not within a period of three years, and also that the existing security was to be according to the moneys that were actually advanced. The proposed new lenders were the Industrial Bank of Western India Ltd., and the plaintiff's case, as outlined to us, is that this Bank inspected the title deeds and made certain inquiries, which took the matter on to February or thereabouts, and that moreover by a letter of January 4, 1924, a formal notice had been given by the defendant-company to the plaintiff that they would repay his loan.

9. Then, according to the facts as stated to us, in February 1924 the plaintiff gave notice to the company to pay off his debt by the end of the month. That was not done. Legal opinion was taken, and counsel was instructed to draw the plaint. There was some delay in getting the draft, viz., from March to May. Then, on June 4, 1924, a winding-up petition was presented, and this plaint was not filed till June 28. The learned Judge in the Court below has refused the application of the plaintiff for leave u/s 171 of the Indian Companies Act. He now appeals to us against that refusal.

10. Now, the suit brought by the plaintiff as presented to us is really a three-headed one. I have mentioned two of the heads, viz., (1) a suit to obtain specific performance of an agreement to mortgage, and to enforce that mortgage by sale, and (2) a suit to enforce a mere money demand, involving a mere money decree. But during the course of the plaintiff's argument he put forward yet a third head on which he claimed this leave. He said that by reason of the title deeds having been sent by the company to the plaintiff on July 6, there was an equitable mortgage by deposit of deeds, as there was, within the meaning of the Transfer of Property Act, an intention to create a mortgage thereby.

11. Now, in the first place, no such point was ever taken in the plaint: no such point has been taken in the Court below, nor in the memo. of appeal to us. On the merits one may say at once that in England sending the title deeds to a proposed purchaser or to a proposed mortgagee might be a highly significant course of conduct, inasmuch as in the ordinary course of business that would never be done. On the contrary, it would be for the vendor or mortgagor to furnish an abstract of title to the proposed purchaser or mortgagee, and for the latter to inspect the deeds at the offices of the solicitors of the vendor or mortgagor. Still the practice in Bombay at any rate as regards sales is entirely different. There the practice is not to furnish an abstract of title but for the vendor's solicitors to send the title deeds to the purchaser for perusal and investigation. Consequently, it might very well be that in this case they were sent not with the intention to create a mortgage but simply in the ordinary course of business prevailing in Bombay, and with no other intention. It may well be, therefore, that there was no intention to create thereby a mortgage within the meaning of the Transfer of Property Act. If, however, the matter depended on what was the real intention of the parties, then it might be proper for us to permit the suit to be amended and to proceed on that basis, so that the question

as to what was the real intention of the parties might be properly determined in the ordinary way in a contested suit. Why we do not take that course is that even if there was such an intention, and even if there was such an equitable mortgage created, still u/s 109 of the Indian Companies Act, it was clearly void against the liquidator and the creditors of the company, because no particulars of the charge created were ever registered. In this respect we think it clear, particularly having regard to the use of the words "together with the instrument if any by which the mortgage or charge is created or evidenced," that it was necessary to file with the Registrar the particulars of the mortgage by deposit of title deeds, whether or no it was accompanied by a memorandum of deposit. I say nothing as to whether it would be also affected by the Indian Registration Act.

12. That being so, it is practically admitted in reply that the plaintiff's case, in so far as it would rest solely on such an alleged mortgage by deposit of deeds, must necessarily fail even if the suit was amended and we gave the necessary leave. Under these circumstances we think it would not be right to grant leave to sue the company in respect of a particular claim which is barred clearly by the law of the land and which must necessarily fail. Accordingly, I shall confine the rest of my judgment to the claims put forward in the original plaint.

13. Now the strength of the applicant's case for some form of leave appears to us to depend on whether the money claim against the company, and the two defendant agents can be properly and conveniently determined in the winding-up of the company. Both these agents have become insolvent, so we are informed, and it may be therefore that so far as they are concerned it may be necessary, or to any rate proper, to have the Official Assignee added in the suit. But in the first case, so far as regards the defendant-company, this is far from being a case of an undisputed money debt. The liquidator has put in what he describes as a written statement in answer to the present application, and he contends that he has reason to believe that the company is not liable for the amount alleged to have been advanced, that the agreement was without consideration, that the advances having been already made to the members of the agency firm no further consideration passed to the company, and in para. 22 that no consideration passed to the company either before or after the alleged agreement. Then in para. 18 he states that the alleged resolution of the directors relied upon by the applicant appears to be fraudulent, collusive, and unauthorized ; and, even if valid, would create no enforceable right in favour of the applicant as against the company. In short, as I understand it, his case is going to be this that the large debt in question was really a personal debt of the agents which they fraudulently attempted to foist on to the company and that the company are in no wise liable for that debt.

14. Now is that the kind of case which can be conveniently tried in a winding-up, or is it more convenient and proper that it be determined in an ordinary suit in the ordinary way ? So far as the practice on the Original Side of the High Court is concerned, both my brother Kemp and myself agree in thinking that the practice

here is that a heavy contested claim of that sort is usually, if not invariably, left to be decided by a suit in the ordinary way. In fact neither of us can remember an issue in such a heavy claim as this being set down by the Chamber Judge in a winding-up for decision in Court by him or by some other Judge. To hear a matter of that sort in Chambers would be impracticable.

15. If one turns to the English practice, in Palmer's Company Precedents, Vol. II, (12th Edn.) Winding-up, it is said (p. 452):-

In determining whether to give leave or not, the Court considers the question of convenience and the special circumstances of the case.

16. Then, after giving certain instances, he says (p. 453):-

In such cases as the above the machinery of an action is better fitted to secure justice than a proceeding by motion or summons in the winding-up. But the discretion of the Court under sect. 142 is not limited to cases which concern the mode of trial.

17. It was argued that this only applied to leave given to secured creditors or persons in similar position. But it is also stated on p. 453 :-

18. Except in the case of proceedings to enforce the rights of secured creditors, or for the recovery of specific property, the Court, in giving leave to proceed, generally requires an undertaking on the part of the applicant not to enforce against the company without the leave of the Court any judgment obtained; the object in giving leave being merely to facilitate the ascertainment of the rights of the claimant in the most convenient mode, and not to give him priority over the other creditors.

So that that passage clearly contemplates that cases may arise where an unsecured creditor is left to a suit to establish his rights against the company.

19. Speaking of my own recollection of the English practice, I should say that that undoubtedly was done when you came to matters such as we have here, viz., charges of fraud and collusion and of dummy resolutions passed by the directors of the company for the benefit of the agents and not of the company. There is this further circumstance, which has to be taken into consideration, that we have here according to the resolution a joint and several liability by the company and of defendants Nos. 2 and 3 for the amount of this debt. Prima facie it is convenient that their respective liabilities should be determined in one suit. I think there is great force in the argument of counsel for the applicant that if these resolutions eventually stand, then it may be argued-I do not say successfully-that the agents were thenceforth merely in the position of sureties, and that the principal debtors were the company. If so, then surely the rights of the parties ought to be determined, if practicable, in one suit, because otherwise it is conceivable that different results might be arrived at say in a winding-up, and in one or other of the two insolvencies.

20. There is a further point u/s 43 of the Indian Contract Act as to whether in any event the company and defendants Nos. 1 and 2 ought not to be parties to a suit on this agreement. But as to this it is to be observed that this is a joint and several liability and not a joint liability, and that, accordingly, we think we are not called upon to consider the difficulties raised in certain cases in India and referred to in the notes to that section in Pollock and Mulla's Indian Contract Act where you get a case of joint promissors.

21. But, even if separate suits can be brought, we have yet to consider what is the balance of convenience, and none the less so because we already have an existing suit filed, late though it may be but still filed against all these parties. Accordingly, so far as regards the question of a mere money claim, we consider that leave ought to be given to the applicant to continue the suit.

22. I will now consider whether leave ought to be given as regards the entirety of this suit, or whether it should be confined. I have already said that we reject the contentions of the applicant that he should be allowed to amend his suit, and sue on the basis that the deposit of title deeds on July 6 effected an equitable mortgage in his favour. He is consequently left with the agreement of June 28, which he has asked to be enforced by specific performance and sale.

23. Now, in the first place, I think there is some force in the contention of the defendant as to what exactly is the agreement relied upon by the plaintiff. Is it oral or in writing, and, if so, what writings and on what dates ? It will be observed from his plaint that he sets out, I think, the resolution of June 28 and a letter from the agents of the same day, yet pleads nevertheless that the agreement was varied in a material particular at a later date and by means which he does not specifically state. Whether the variation-I mean as regards the amount of the loan and the date of its repayment-was effected orally or in writing, and if so when, is not at any rate specifically stated. But assuming that by an amendment that could be made clear, and assuming that he is suing on an agreement effected by a resolution of the directors and the agents and the letter of June 28, as subsequently modified by some agreement in October or November of that year, what is his legal position under the agreement contained in that resolution to give "a proper legal first charge on the assets of the company" ?

24. Now if this was a case in England, and if one can read that word "charge" as meaning a mortgage, then it is clear that by the law of England an agreement to give a legal mortgage would then and there create an equitable mortgage, which could be enforced by a suit for specific performance of the agreement, and also to enforce the equitable mortgage itself. This I take it would be on the basis of the maxim that equity regards as done that which ought to be done. Thus in *Ashburner on Mortgages*, 2nd Edn., it is said (p. 23):-

A mortgage is created in equity by an agreement to give a legal mortgage. The right of the equitable mortgagee is to have his security perfected by the

execution of a legal mortgage; and he can combine this remedy with an action for foreclosure.

25. In *Matthews v. Goodday* (1861) 31 L.J. Ch. 282 Vice Chancellor Kindersley in dealing with the various forms of equitable mortgages says (p. 283):-

So in the simple case put of an agreement by a party that his lands should stand charged with the payment of a sum of money to A, the only right of the party in whose favour the agreement is made is to come into equity and ask to have the charge raised by sale or mortgage ; but he has no right to come into this court for a decree that the party shall give him a legal mortgage. It is to be borne in mind that a legal mortgage may be more or less beneficial to the party than to have the sum raised by sale or mortgage. But the thing would be distinctly an equitable charge, and not a mortgage nor an agreement to give one. On the other hand the party might agree that, having borrowed a sum of money, he would give a legal mortgage whenever called upon. That agreement might be enforced according to its terms, and the Court would decree a legal mortgage to be given, and would also foreclose the mortgage, unless the money was paid.

It is the former, so it is said, which we have here, viz., a mere agreement to create a charge.

26. Now, following out the English law for a moment, it is equally clear that as an agreement to give a legal mortgage would amount ipso facto to an equitable mortgage, the lender would become a secured creditor from the date of the agreement. Consequently, in a case like the present, he would be a secured creditor at the date of the winding up. It follows, therefore, that in English law he would get leave either to bring or continue an action to enforce his security because he was a secured creditor. Thus, in *In re David Lloyd & Co. : Lloyd v. David Lloyd & Co* (1877) 6 Ch. D. 339 the headnote of the decision of the Court of Appeal runs as follows:-

When an order has been made to wind up a company, a mortgagee who has commenced an action against the company to realize his security ought to have leave, under sect. 87 of the Companies Act, 1862, to proceed with his action, except under special circumstances, or unless the same relief is given to him in the winding-up as he would obtain in the action.

27. That, it will be observed, was a case where an equitable mortgage had been created by deposit of deeds with David Lloyd the vendor to the Bank to secure a sum of ₹40,000 for unpaid purchase money.

28. But that is not necessarily the law in India. Admittedly a mere agreement to create a mortgage is not within the provisions of the Transfer of Property Act, which defines various types of mortgages and the rights enjoyed by the mortgagors and mortgagees therein respectively. That Act does indeed apply to mortgages by deposit of deeds in Presidency Towns, but it is studiously silent as regards whether a mere agreement to create a mortgage amounts in itself to an

equitable charge. So far as the arguments have been presented to us, counsel for the applicant has been unable to furnish us with any authority in support of the view that an agreement of that nature creates a mortgage here. Mr. Thakor for the respondents has referred us to a dictum of Sir Lawrence Jenkins, in *Shivlal Motilal (Raja Bahadur) v. The Tricumdas Mills Company, Limited* ILR (1911) 36 Bom. 564 and sequitur. But whether that statement is correct or not, and whether we could adopt the argument of the applicant that a valid mortgage can be created quite outside the Transfer of Property Act even as regards Immovable property, for which proposition no authority has been cited to us, yet the applicant is on the horns of a dilemma. If we accede to his contention that the agreement of Juno 28 ipso facto created an equitable mortgage, then this is caught by Section 109 of the Indian Companies Act as being a charge on Immovable property of the company, and is equally void so far as regards the companies' Immovable property both against the liquidator and against the creditors of the company. If, however, it did not create an equitable mortgage, then at the date of the winding-up order, the plaintiff was an unsecured creditor.

29. The position, then, so far as regards the Immovable property, is much like that of the alleged equitable mortgage by deposit of title deeds which we have already discarded. It is also clear that under the same section in so far as the mortgage was to be one on the uncalled share capital of the company or on any book debts of the company, or in so far as it can be considered a floating charge on the undertaking or property of the company, then also it was void. But Mr. Desai's contention was: "True it may be void as regards the Immovable property, but at any rate as regards some of the moveables, it would or might be valid." For instance, as regards the machinery of the company which would be in the mill, he contended that that machinery would be loose machinery, and would not pass as part of the Immovable property.

30. In this respect a recent case decided in this Court of *D. Pudumjee and Co. Vs. N.H. Moos*, has some bearing. There it was agreed that the borrowers should put the lender in possession of all property of the borrowers including the printing machinery, papers and other moveable property of a newspaper and printing concern, amongst certain other terms. It was held by the Appeal Court (1) that though the parties intended by the agreement to create a charge upon all the Company's moveable property, present and future, it was not a case of specific goods having been marked off and given over to the lender, and the possession contemplated by it was not a complete and effective transfer of possession but a temporary arrangement until a mortgage was executed; and (2) that the parties did not create a pledge of existing properties, but they intended to create a floating charge on the moveable property of the company, within the meaning of Section 109 of the Indian Companies Act, and the charge was void for want of registration.

31. I have already mentioned what the precise agreement was in the present case, viz., a first legal mortgage or charge on the assets of the company. Mr.

Desai for the appellant was driven to contend that as regards the machinery he got a fixed charge on the machinery existing on June 28, and that consequently as regards the machinery added after that date he would get no charge at all. But these words being in such wide terms, I should have thought that on their true construction it was intended that there was to be a floating charge as regards at any rate the moveables of the company. If so, then they would be caught u/s 109 (e) of the Indian Companies Act. But in the present case there was not even the possession that was given in *Pudumjee's* case. The applicant here got possession of nothing whatever. All moveables from first to last remained in possession of the company. And no authority was cited to us to show that a mere agreement to give a first legal mortgage of moveables in itself by the law of India creates a valid equitable mortgage. It would indeed be strange if a similar agreement as regards the immovables created no charge, but that a corresponding agreement as regards the moveables did.

32. Then alternatively the applicant put his case in this way. He said: "Very well, if I don't get any equitable charge either on my immovables or moveables by the agreement of June 28, then nevertheless I am entitled to come in the winding-up and claim specific performance of the agreement." Now that was the original claim, and that was the claim which was dealt with by the learned Judge in the Court below. The difficulty in the way of the applicant is that if he takes up that position, then at the date of the winding-up order he was not a secured creditor. And the effect of his present application is to be allowed after the winding-up to change his position from that of an unsecured creditor to that of a secured creditor.

33. Now I wish to make it perfectly plain that we are not deciding that after a winding-up no suit for specific performance of any sort or kind can ever be brought against a company. Authorities before us show that that is not correct. But no authority has been cited to us to show that an unsecured creditor can thereby be turned into a secured creditor. On the contrary the decision of the House of Lords in *Bank of Scotland v. Macleod* [1914] A.C. 311 shows that in general a rigid line is drawn at the winding-up, and that creditors are not allowed to change their position after that date. There Lord Kinnear says (p. 317) :-

I do not understand it to be disputed that in this respect the company in liquidation is exactly in the same position as an individual debtor under the Bankruptcy Acts. Rights in security which have been effectually completed before the liquidation must still receive the effect which the law gives to them. But the company and its liquidators are just as completely disabled by the winding-up from granting new or completing imperfect lights in security as the individual bankrupt is by his bankruptcy. This, indeed, is the necessary effect of the express provision of the Companies Act that the estate is to be distributed among the creditors *pari passu*. Every creditor is to have an equal share, unless any one has already a part of the estate in his hands, by virtue of an effectual legal right. The question, therefore, is whether, at the date of the liquidation, the

appellants had obtained a valid security legally completed over the debenture issued...

34. Accordingly, in that case the Court refused to order the liquidator to transfer to the Bank a debenture of an English Company which the company then being wound up had prior to the winding-up agreed specifically to assign to the bank in consideration of the bank releasing, as in fact it did, certain goods which at that date it held as security. There the Bank had given up the goods in reliance on the agreement. They had also got a contract for the assignment of a certain chose in action containing a charge over a third party's property. Yet the House of Lords refused to direct the company to complete the contract by assigning the debenture in question to the Bank. On the contrary the debenture of this third party was to be dealt with as part of the general assets of the company being wound up available for all its creditors *pari passu*.

35. It is quite true that in that case the argument presented to their Lordships was that there was a trust created in favour of the Bank, or as it might perhaps be put that the debenture in question was earmarked for the Bank and separated from the general body of the assets of the company in question. That argument did not prevail. It is also true that, so far as our attention has been drawn to the case, the Bank's claim was not put on the ground of specific performance. But considering the nature of the case and the tribunal before whom it came, it can hardly be said to be an argument against the validity of the decision that that particular point was not expressly mentioned.

36. It comes to this then as to whether u/s 171 of the Indian Companies Act it would be proper in the present case to allow the applicant to change in a very material respect his legal position as opposed to that of the other creditors. We think it would not, and we may point out that in this particular case it would involve this that by an agreement unregistered and for all we know unstamped, which was not on the land registry of the country nor yet on the company's register and was executed so long ago as about a year before the winding-up of the company, the applicant could nevertheless claim to be entitled to substantially all the assets of the company to the extent of seven and a half lacs and upwards in priority to all the other creditors of the Company. It is clearly the policy of the Companies Act that at any rate so far as regards Immovable property and certain description of charges a full notice should be contained in the company's register, so that any creditor or person intending to deal with the company can ascertain its financial situation in that respect by inspecting the company's register. But if we were to accept the argument that an agreement for a mortgage could successfully evade this and be kept (I was going to say) up the sleeve of one particular creditor till after a winding-up order is made it would certainly *prima facie* seem a great hardship on other persons dealing with the company in total ignorance of the fact that the whole of the assets of the company were already pledged for a very large sum. Admittedly no case of this description in which leave has been granted has been brought to our notice. We

think, therefore, under all the circumstances of this case, that it would not be right to grant leave to the applicant to continue his suit against the company so far as he claims to obtain or have a charge on the company's property, whether moveable or immovable, and whether under an existing charge created in 1923 or whether by obtaining a decree for specific performance of the agreement of 1923.

37. That being so, the situation is this that we think the suit ought to go on qua the money demand but be limited entirely to that claim. As to that, we have power to impose terms u/s 171, and, accordingly, the terms we impose on granting this concession is that the applicant do first elect whether he will amend his plaint in the suit by confining the relief claimed to a mere money demand and by abandoning all claims on the basis of his being a secured creditor, or entitled to become one by specific performance or otherwise. We will give him a month in which to make his election. If he elects to take that course, the leave will be granted. If he does not elect to take that course, then the present application will be dismissed. There will be liberty to apply.

Kemp, J.

38. I agree with the order proposed.

39. This is an appeal against the order of the District Judge refusing leave to the applicant to proceed with the suit against the first opponent-company and opponents Nos. 2 and 3 who are the agents of the Company for various reliefs. One of the reliefs relates to specific performance, of an agreement which is alleged by the applicant to have taken place on June 28, 1923. Now the learned Judge has refused leave on the assumption that, first of all, the moneys in respect of which the agreement to mortgage is alleged to have been passed were paid to the company and, secondly, that the agreement of June 28, 1923, had fallen through. He, therefore, held that the plaintiff was not entitled to proceed with the suit, and must proceed to prove his claim as an ordinary creditor.

40. Now it is true that in dealing with this matter what we have to see is whether a prima facie case exists for giving leave. The applicant rests his case mainly on the agreement to mortgage. Mr. Desai for the plaintiff in his reply admitted that he did not claim that the mere agreement to mortgage constituted any charge, and if he had claimed that, obviously he would have been met by Section 109 of the Indian Companies Act. Now an agreement to mortgage creates in itself no interest in the property, and although it may be that such an agreement creates an equitable mortgage in England, turning to Section 58 of the Transfer of Property Act, the way in which mortgages may be created here is stated in that section. There is a proviso to Section 59 that nothing in that section shall be deemed to render invalid mortgages in Presidency Towns by deposit of title deeds. No provision is to be found for an equitable mortgage of the nature contended for by the applicant. Therefore, so far as the applicant is concerned, he has merely an agreement to mortgage in his favour. It would be inequitable to

allow him to constitute himself a secured creditor by giving him specific performance of such an agreement.

41. Then Mr. Desai contended that there had been an equitable mortgage by deposit of title deeds during the course of the negotiations following on the agreement of June 28, 1923. So far as that is concerned, the answer to it is again Section 109 of the Indian Companies Act. The particulars of any such mortgage and the document itself should have been registered with the Registrar of Companies,

42. Then, driven from these two positions, Mr. Desai's last point was that he was at any rate entitled to specific performance of the agreement to give a mortgage so far as the moveables of the company are concerned. As to that it is to be noticed that no possession was taken under the alleged agreement to mortgage, and so far as the creditors were concerned, the property still remained the property of the company. Clearly, the intention of the parties was that there should be a legal mortgage or charge on the whole assets of the company. I am, of course, assuming that an agreement was made on behalf of the company. That is a fact in issue. So far as the necessity of registration of the particulars with the Registrar of Companies is concerned, it is clear that the applicant could not in this case obtain any extension of time within which he might effect such registration because the company had already been ordered to be wound up.

43. Then there is the fact that in his plaint the applicant does not state that he claims specific performance of a covenant to mortgage moveables or an equitable mortgage by deposit of title deeds.

44. Under these circumstances, I think that the only relief to which the applicant may be entitled is to prove his claim in respect of the money advanced. Now on this point Mr. Thakor states there should be no difficulty in proving the claim in the winding-up. The fact that a promissory note was passed for eleven per cent, interest by the agents of the company, when the company were in the habit of paying six per cent, interest, tends to show that the company was not liable but that the loan was to the agents personally. Further, Mr. Thakor refers to the entries in the company's books and the fact that the agents drew out these moneys and he says that this clearly shows that the moneys were never received or used by the company, but used entirely by the agents. That may be so. But in this case there are charges of fraud which, in my opinion, are more suitably tried by a separate suit. I, therefore, agree with the order proposed.

Amberson Marten, Kt., C.J.

45. I should have added that if the applicant elects to confine his suit to a money claim, then the undertaking referred to in Palmer, Vol. II, at p. 453, on the part of the applicant must be given by him, viz., that he will not enforce against the company without the leave of the winding-up Court any judgment obtained. If the applicant elects to amend his plaint in the way I have mentioned, then the order of the Court below will be varied accordingly. If, on the other hand, the

applicant elects the contrary, then the present appeal will be dismissed, and we think with costs. But if, on the contrary, he elects to amend, then we think the fair order as to costs would be that the applicant should pay half the costs of the liquidator of the present proceedings. Substantially the fight has been on the question whether the applicant is a secured creditor or not, and on that the applicant, in our opinion, has failed. If necessary the liquidator will get the balance of his costs out of the assets.